

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

HARRISON OLIVER BAILEY, IV,  
TDCJ No. 1833501,

Petitioner,

V.

DIRECTOR, TDCJ-CID,

Respondent.

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No. 3:20-cv-2530-K-BN

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE JUDGE**

Petitioner Harrison Oliver Bailey, IV, a Texas prisoner, has filed a *pro se* application for writ of habeas corpus under 28 U.S.C. § 2254. *See* Dkt. No. 3. This resulting action has been referred to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference from United States District Judge Ed Kinkeade. And the undersigned enters these findings of fact, conclusions of law, and recommendation that, for the reasons and to the extent explained below, the Court should dismiss the habeas application with prejudice under Rule 4 of the Rules Governing Section 2254 Cases (“Habeas Rule 4”).

**Applicable Background**

Bailey was charged with aggravated sexual assault in three separate cases, in which he waived trials by a jury, entered agreed please of guilty, and was sentenced to concurrent terms of 50 years of imprisonment. *See State v. Bailey*, Nos. F12-70124-U, -71031-U, -71032-U (291st Jud. Dist. Ct., Dallas Cnty., Tex. Jan. 14, 2013). While he did not appeal, he did file state habeas applications in 2017, each of which the

Texas Court of Criminal Appeals denied without written order on the trial court findings without a hearing later that year. *See Ex parte Bailey*, Nos. WR-87,206-01, -02, -03 (Tex. Crim. App. Dec. 13, 2017). Bailey did not then pursue Section 2254 relief related to these denials. Instead, he has now filed a Section 2254 application collaterally attacking the state habeas proceedings. *See, e.g.*, Dkt. No. 3 at 2 & 6 (raising two grounds: “[d]enial of due process by the Texas courts during habeas review” and “[d]enial of equal protection by the Texas courts during habeas review”).

### **Legal Standards and Analysis**

Under Habeas Rule 4, a district court may summarily dismiss a 28 U.S.C. § 2254 habeas application “if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” *Id.*

This rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses. The district court has the power under [Habeas] Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state. This power is rooted in “the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer.”

*Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes).

Here, the Court should exercise its power to summarily dismiss Bailey’s application under Habeas Rule 4.

First, the only grounds Bailey raises in his application are not cognizable in federal habeas proceedings. *See, e.g., Vizcarra v. Reagans*, 600 F. App’x 942, 943 (5th Cir. 2015) (per curiam) (“To the extent that Vizcarra’s underlying claims challenge

the procedural adequacy of state post-conviction proceedings, he fails to raise a cognizable issue under § 2254 because “infirmities in state habeas proceedings do not constitute grounds for federal habeas relief.” (quoting *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir. 1992); citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”))).

And, although Bailey explicitly attacks the state habeas proceedings, given that he filed this case *pro se*, if his application can somehow be construed as attacking his underlying state criminal judgments, it is time barred and thus should still be dismissed under Habeas Rule 4.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) establishes a one-year statute of limitations for federal habeas proceedings brought under 28 U.S.C. § 2254. *See* ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). The limitations period runs from the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due

diligence.

28 U.S.C. § 2244(d)(1). The time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the limitations period. *See id.* § 2244(d)(2).

The one-year limitations period is also subject to equitable tolling – “a discretionary doctrine that turns on the facts and circumstances of a particular case,” *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), and only applies in “rare and exceptional circumstances,” *United States v. Riggs*, 314 F.3d 796, 800 n.9 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). “[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.’” *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

Taking the second prong first, “[a] petitioner’s failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner’s own making do not qualify.” *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam) (citation omitted). This “prong of the equitable tolling test is met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond [the litigant’s] control.” *Menominee Indian Tribe*, 136 S. Ct. at 756 (emphasis in original).<sup>1</sup>

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<sup>1</sup> *See, e.g., Farmer v. D&O Contractors*, 640 F. App’x 302, 307 (5th Cir. 2016) (per curiam) (holding that because “the FBI did not actually prevent Farmer or any

But “[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.’ What a petitioner did both before and after the extraordinary circumstances that prevented him from timely filing may indicate whether he was diligent overall.” *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (quoting *Holland*, 560 U.S. at 653; footnote omitted).

A showing of “actual innocence” can also overcome AEDPA’s statute of limitations. See *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence gateway is only available to a petitioner who presents “evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.” *Id.* at 401 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

That is, the new, reliable evidence must be enough to persuade the Court that “no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 386 (quoting *Schlup*, 513 U.S. at 329).<sup>2</sup>

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other Plaintiff from filing suit” but instead “advised Farmer that filing suit would have been against the FBI’s interest” and “that the RICO claims could be filed after the investigation concluded,” “[a]ny obstacle to suit was ... the product of Farmer’s mistaken reliance on the FBI, and a party’s mistaken belief is not an extraordinary circumstance” (citing *Menominee Indian Tribe*, 136 S. Ct. at 756-57)).

<sup>2</sup> See also *Johnson v. Hargett*, 978 F.2d 855, 859-60 (5th Cir. 1992) (“The Supreme Court has made clear that the term ‘actual innocence’ means *factual*, as opposed to *legal*, innocence – ‘legal’ innocence, of course, would arise whenever a constitutional violation by itself requires reversal, whereas ‘actual’ innocence, as the Court stated in *McCleskey [v. Zant]*, 499 U.S. 467 (1991)], means that the person did not commit the crime.” (footnotes omitted)); *Acker v. Davis*, 693 F. App’x 384, 392-93 (5th Cir 2017) (per curiam) (“Successful gateway claims of actual innocence are ‘extremely rare,’ and relief is available only in the ‘extraordinary case’ where there was ‘manifest injustice.’ *Schlup*, 513 U.S. at 324, 327. When considering a gateway claim of actual innocence, the district court must consider all of the evidence, ‘old

“[E]ven though the statute of limitations provision of the AEDPA is an affirmative defense rather than jurisdictional,” a district court may dismiss a time barred Section 2254 application *sua sponte* under Habeas Rule 4. *Kiser*, 163 F.3d at 329. “[B]efore acting on its own initiative’ to dismiss an apparently untimely § 2254 petition as time barred, a district court ‘must accord the parties fair notice and an opportunity to present their positions.’” *Wyatt v. Thaler*, 395 F. App’x 113, 114 (5th Cir. 2010) (per curiam) (quoting *Day v. McDonough*, 547 U.S. 198, 210 (2006); alteration to original). And, particularly given the circumstances of this case, these findings, conclusions, and recommendation provide Bailey fair notice as to limitations. See, e.g., *Ingram v. Director, TDCJ-CID*, No. 6:12cv489, 2012 WL 3986857, at \*1 (E.D. Tex. Sept. 10, 2012) (a magistrate judge’s report and recommendation also gives the parties “fair notice that the case may be dismissed as time-barred, which [gives a petitioner] the opportunity to file objections to show that the case should not be dismissed based on the statute of limitation” (collecting cases)).

Because Bailey did not file a direct appeal, the state criminal judgments entered on January 15, 2013 became final for limitations purposes 30 days later, on February 14, 2013. See TEX. R. APP. P. 26.2(a)(1). And, “[b]ecause his state habeas

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and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.’ *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks and citations omitted). ‘Based on this total record, the court must make “a probabilistic determination about what reasonable, properly instructed jurors would do.” *Id.* (quoting *Schlup*, 513 U.S. at 329). ‘The court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.’ *Id.*” (citations modified)).

petition[s were] not filed within the one-year period” that commenced on that date, they “did not statutorily toll the limitation clock.” *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013) (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (in turn citing 28 U.S.C. § 2244(d)(2))).

Accordingly, to the extent that the Section 2254 habeas application may be liberally construed to raise claims collaterally attacking the underlying state convictions and sentences, the application – filed no sooner than August 18, 2020, the date on which Bailey certifies that he placed it in the prison mailing system,<sup>3</sup> see Dkt. No. 3 at 10 – was filed more than 6 years and 6 months too late.

The application is therefore due to be denied as untimely absent statutory or equitable tolling of the limitations period or establishment of actual innocence. But, considering the allegations Bailey makes, aimed at the constitutional adequacy of the state habeas proceedings, he fails to make either showing.

### **Recommendation and Directions to Clerk**

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court should dismiss Petitioner Harrison Oliver Bailey, IV’s 28 U.S.C. § 2254 habeas application with prejudice. And the Court should direct that the Clerk of Court serve any order accepting this recommendation on the Texas Attorney General.

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<sup>3</sup> See RULE 3(d), RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (“A paper filed by an inmate confined in an institution is timely if deposited in the institution’s internal mailing system on or before the last day for filing.”); *Uranga v. Davis*, 893 F.3d 282, 286 (5th Cir. 2018) (“We reaffirm that the operative date of the prison mailbox rule remains the date the pleading is delivered to prison authorities.”).

The Clerk shall serve electronically a copy of this recommendation and the petition, along with any attachments thereto and brief in support thereof, on the Texas Attorney General as counsel for Respondent, directed to the attention of Edward L. Marshall, Chief, Criminal Appeals Division, Texas Attorney General's Office. *See* RULE 4, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: August 28, 2020



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DAVID L. HORAN  
UNITED STATES MAGISTRATE JUDGE